UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 8

LANDMARK FAMILY FOODS, INC., dba CHURCH SQUARE SUPERMARKET Respondent

and

CASE NOS. 8-CA-37667 8-CA-38794

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 880 Petitioner

EXCEPTIONS BRIEF ON BEHALF OF RESPONDENT LANDMARK FAMILY FOODS

I. STATEMENT OF THE CASE

The claims advanced by the United Food and Commercial Workers Union Local 880 (hereinafter "Petitioner" or "Union") are not supported by the evidence presented in this matter. Landmark did not violate Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 et. seq., in the respects alleged. A review of the facts and circumstances surrounding the history and negotiations between the Union and Respondent belies the findings and conclusions made by the ALJ.

Landmark and Petitioner have a long history in conducting business with each other. Landmark is an unsophisticated, inner city grocery store that entered into collective bargaining agreements with Petitioner for over a decade. These collective bargaining agreements were entered into with the understanding that the Union would not require every employee of Landmark to be included in the bargaining unit. This "understanding" between the Union and Landmark worked over the years but fell apart when terms of a new collective bargaining agreement could not be reached. This is when the Union used its powers and resources against

this single store to conduct audits (the Union claims the audits are a fiduciary duty but in practicality are a strong-arm tactic to get the employer to agree to its terms as the Union already was aware of what the audits would show) and initiate litigation.

Landmark's business is located in a poverty stricken area of Cleveland, Ohio. The fact that Landmark is located in a depressed area is important to show the validity of Landmark's claims that it could not afford the Union's proposals, the fact that the Union had knowledge of Landmark's inability to pay and the Union's numerous disingenuous allegations.

Landmark engaged in good faith negotiations to reach a successor collective bargaining agreement with the Union. Landmark and Union have successfully negotiated collective bargaining agreements over the last decade. (Transcript 209, 1096). The negotiations between the parties always took place between two experienced negotiators, David Levine (hereinafter "Levine") on behalf of Landmark and Michael Krzys (hereinafter "Krzys") on behalf of Union. (Tr. 207, 1098-1099). Levine and Krzys were very familiar with each other and they chose to conduct bargaining sessions in an informal setting.

The last collective bargaining agreement between Landmark and Union was in effect February 8, 2004 through February 3, 2007. (G.C. Ex. 6). Levine and Krzys began negotiations for a successor collective bargaining agreement beginning in January 2007 and they continued negotiations until February 3, 2008. As noted in Landmark's closing brief and as observed in the ALJ's decision, at the beginning of negotiations, Landmark conveyed to Union representative Michael Krzys that it was experiencing financial difficulties. During that time, nine bargaining sessions took place as evidenced by Krzys' bargaining notes and calendar. (G.C. Exs. 23, 25). The Union did not listen to Landmark and continued to insist that Landmark agree to the Union's proposed increases to wages, pension benefits and health and welfare benefits or it would file charges with the NLRB. Landmark specifically stated that it would not

agree to the Union's thirty cent pension increase, yet the Union never modified its pension proposal. As a result, the parties were at impasse in February, 2008 and any attempt by the Union to continue negotiations beyond that date was motivated to strictly harass Landmark and justify charges filed with the NLRB. After impasse, Landmark made unilateral changes to insurance benefits.

Subsequent to impasse, litigation between Landmark and the Union ensued and the parties did not speak for over year and half with respect to collective bargaining agreement negotiations. Landmark, pursuant to a Federal Court settlement, went back to the bargaining table in good faith to try to negotiate a successor collective bargaining agreement. Prior to one bargaining session and no substantive communication between the parties the Union filed a charge against Landmark for bad faith bargaining and failure to timely provide requested documentation.

II. QUESTIONS INVOLVED

- 1. Whether impasse existed and Respondent was justified in making unilateral changes to benefits (Exception 1).
- 2. Whether Respondent had good faith reasons to be skeptical of Union bargaining tactics and the Union's burdensome requests and demands of Respondent such that the Union did not remain flexible and willing to negotiate in good faith (Exceptions 2 & 3).

III. ARGUMENT

A. RESPONDENT WAS ENTITLED TO MAKE UNILATERAL CHANGES AFTER IMPASSE WAS REACHED.

The National Labor Relations Act, 29 U.S.C. § 151 et seq. ("Act"), requires that the parties bargain in good faith until an agreement is reached or until any realistic possibility of reaching agreement is exhausted. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), petition for review denied

395 F.2d 622 (D.C. Cir. 1968). An impasse exists in the latter situation, when there are no realistic possibilities for an agreement. See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988). The Act does not encourage or require a party to engage in fruitless discussions. *Id.* (noting that an impasse is found when "the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." (omitting internal quotation)). The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 401-02 (1952).

Respondent recognizes that "[a]n impasse does not destroy the collective bargaining relationship." Airflow Research & Mfg. Corp., 320 NLRB 861, 862 (1996) (footnote omitted). However, it "suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible." Id. (emphasis added). Respondent simply does not have the resources to comply with the Union's demands. Respondent's financial circumstances have not changed in this regard and, if anything, have since worsened since the time impasse was reached (and, at present, continue to worsen). There has been no evidence that the Union was or is willing to modify its demands regarding benefit and pension contributions, and due to Landmark's financial struggles, Landmark was not, and is not, able to meet these demands.

Respondent understands that limited negotiations on an issue at the center of an impasse, or the Union's willingness to remain flexible or to bargain, may render "impasse" premature and invalid. See *Beverly Farm Foundation, Inc. v. N.L.R.B.*, 144 F.3d 1048, 1052 (C.A.7, 1998). However, where, as here, the Union makes implausible demands or is unwilling to compromise, a valid impasse exists. See *Clarke Mfg., Inc.*, 352 NLRB 141 (2008). An impasse does not require that a party be unwilling to alter its proposal on each issue; in other words,

impasse does not require a deadlock on all issues. See American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622, 627 n.13 (D.C. Cir. 1968); Richmond Recording Corp. v. NLRB, 836 F.2d 289, 293 (7th Cir. 1987) (impasse may exist where "a key issue" remains unresolved). When the parties are deadlocked over fundamental issues, further negotiations or agreements are not required when they will not resolve the impasse as to the fundamental issue. Clarke Mfg., 352 NLRB 145. The Union's demands regarding pension fund increases were implausible for Landmark, and the Union's unwillingness to retreat from these demands establish valid impasse, especially when considering Landmark's financial difficulties. The ALJ errs in failing to recognize the pension fund contributions as a fundamental issue substantial enough to justify impasse. Although the Union may have been willing to negotiate other, less essential aspects of the agreement, the Union was not willing to modify its pension proposal. Thus, the ALJ erred in finding that no valid impasse existed as of February, 2008.

When a legally cognizable impasse occurs the employer is free to implement changes in employment terms unilaterally. See *P.R.C. Recording Co. v. NLRB*, 836 F.2d 289, 292-93 (7th Cir.1987). The touchstone for determining whether a genuine "impasse" existed at the time the employer instituted unilateral changes is the absence of any realistic possibility that continuation of the negotiations would have been fruitful. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1444 (D.C.Cir.1997). The unilateral changes implemented were necessary to maintain Respondent's financial viability, even if Respondent was not yet taking on new or increased obligations posed by the Union. The ALJ suggests that there was no "economic exigency" that prevented Respondent from maintaining current benefits. (Decision at 7.) Yet, Respondent's financial situation was fragile at the time and financial insolvency was on the horizon. Respondent once again made this clear to the Union as the bargaining process continued, and the Union even recognized the financial difficulty that Landmark was having. (Decision at 17.)

Levine fully informed the Union throughout negotiations that Landmark was experiencing financial problems caused by increased competition, increased wages and costs and a decline in sales volume. This information was conveyed in the second bargaining session evidenced in Krzys' bargaining notes dated July 2007, from Krzys own testimony and Levine's testimony. (See G.C. Ex. 23 and Tr. 230, 244-245, 1102-1104, 1108-1109, 1110-1112, 1139). Continuing negotiations beyond February 2008 would have been a fruitless exercise and an unnecessary expense to an already financially distressed company. Landmark could not afford the Union's mandatory increases and would not agree to the Union's terms. Accordingly, Respondent reasonably and in good faith believed the parties were at a lawful impasse and Landmark was justified in taking unilateral action to avoid financial ruin.

B. RESPONDENT ATTEMPTED TO NEGOTIATE IN GOOD FAITH AND DID NOT ACT IN BAD FAITH FOR REFUSING TO ACQUIESCE TO THE UNION'S BURDENSOME DEMANDS.

The ALJ erred in finding that the Union remained flexible and willing to bargain in good faith, while finding that Respondent was not. The ALJ suggests that during the 2007-08 bargaining period, the "Union continued to demonstrate flexibility and a willingness to compromise," noting specifically that it made concessions regarding part-time clerks and bonuses (see Decision at 9); however, the Union was unwilling to modify its most burdensome demands, namely the pension fund increases. Despite the ALJ's recognition that Union's Counsel understood that Respondent's "financial records showed ... the store was having financial difficulty" (Decision at 17), the ALJ maintained that the Union could in good faith make financial demands to further strain Respondent's budget. The ALJ erred in failing to find that the Union acted in bad faith when the Union knew about Landmark's financial issues, but

¹ The Union claims it first learned of Landmark's financial issues in March 2008, but that claim is contradictory to Krzys' testimony and Levine's testimony. (See Tr. 230, 244, 1138-1139).

continued to insist that Landmark pay increases on pension contributions and health and welfare contributions from the beginning of collective bargaining agreement negotiations. (Tr. 417). The ALJ does not consider how the Union's demands failed to take into account Respondent's dire financial straights and the importance of the demands over which the Union was unwilling to make concessions. Instead, the ALJ sanctioned the Union's choice in standing on its bargaining position from the beginning, refusing to change its position for over a year knowing it has the power and money to force Landmark to sign the collective bargaining agreement.

Moreover, the Union's demand for financial records made by Attorney Eben O. McNair (hereinafter "McNair") after a year of negotiations is evidence of the Union's harassment. McNair, who has never participated in negotiations with Landmark, claims to have sat in on conference call with Krzys and Levine and heard "magic language" to justify the request. Landmark does not conduct business in a land of "magic language"; it conducts business on whether it can pay its obligations. Had the Union been listening to Landmark throughout the year long negotiations the Union would have heard Landmark's rationale for its inability to pay the Union's demands – they could not afford it. The Union understood what the requested records would show, knew Landmark was struggling financially, and knew that if Landmark did not sign a new collective bargaining agreement that Landmark would be forced to pay a pension withdrawal liability penalty in an amount close to seven figures.

Further, the Union's threats to strike demonstrate the unwillingness of the Union to engage in good faith negotiations, providing Respondent with ample reason to be suspicious of the Union and its bargaining tactics. While Respondent does not suggest that the employees do not have a right to engage in such activity, there are certainly limitations to this right. Because the threat took place shortly after the parties entered into negotiations, the Union was

not giving Respondent an adequate opportunity to make progress. The ALJ dismissed the Union's comments, suggesting that they barely rise to the status of "threats," but the ALJ refused to consider the circumstances under which they were made, the affect on Respondent, and the unsavory motivations of the Union to coerce Respondent into entering an ill-advised and untenable agreement. See *Laborers' Local 125*, 260 NLRB 1082, 1086 (1982) (noting that the Board can consider a Union's motivations in threatening to strike). In fact, the ALJ mentions similar statements of Respondent regarding the possibility of having to close down the store seemingly as indicia of bad faith. (Decision at 17.) However, it is clear that Respondent's statements were instigated by, and made directly in response to, the Union's references to implementing a strike. As such, Respondent was entitled to proceed with caution and skepticism. Doing so was not "bad faith" but merely a justified reaction to the Union's strong arm tactics and over-willingness to file charges against Respondent.

IV. CONCLUSION

Landmark and Union were at a valid impasse in February 2008 based on the Union's insistence that Landmark agree to a thirty cent pension increase that Landmark could not afford. Landmark did not engage in bad faith bargaining; instead, the Union's unsavory tactics and Landmark's financial problems justified Landmark's actions throughout the negotiations process. Accordingly, the ALJ's decision is in error and the charges against Landmark should be dismissed.

Respectfully submitted,

Fred S. Papalardo (#0083189) REMINGER CO., L.P.A. 1400 Midland Building 101 Prospect Avenue, West Cleveland, Ohio 44115

(216) 687-1311

Facsimile: (216) 430-2250

E-mail: fpapalardo@reminger.com

Attorney for Respondent Landmark Family Foods, Inc. dba Church Square Supermarket

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November 2010, a copy of the foregoing Exceptions on Behalf of Respondent Landmark Family Foods was sent electronically to:

Daniel White 616 Penton Media Bldg. 1300 Ninth Street Cleveland, Ohio 44114

Administrative Law Judges 1099 14th Street, N.W. Washington, D.C. 20570

Jun Bang National Labor Relations Board Region 8 1240 East 9th Street, Room 1695 Cleveland, Ohio 44199

Fred S. Papalardo (#0083189)